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Supreme Court Of The United States

OCTOBER TERM, 1956

Case No. 743

JOHN ROBERT SHAW, as Executor of the Estate of ANTHONY ALMA RAHNER, Deceased
PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Citation to Opinion below	1
Jurisdictional Statement	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	5
Reasons for Allowance of the Writ	9
1. The Trial court and the Court of Appeals have disposed of the questions in this case arising under the Federal Employers Liability Act in a way directly opposed to and in conflict with the applicable decisions of this Court	9
2. The Trial Court and the Court of Appeals decided the questions of negligence and wilfulness in a way directly opposed to and in conflict with the applicable law of South Carolina	12
3. The Trial Court and the Court of Appeals decided the question of contributory negligence in a way directly opposed to and in conflict with the applicable law of South Carolina	14
Conclusion	17
Appendix—Opinion of the Court of Appeals for the Fourth Circuit	18

TABLE OF AUTHORITIES

Cases

	Page
Allen vs. Southern Ry., 218 S. C. 63, 61 S. E. 2d 660	16
Atlantic Coast Line Railroad Company vs. Ford, 287 U. S. 502, 77 L. Ed. 457	13
Atlantic Coast Line Railroad Company vs. Smalls, 216 Fed 2d. 842 (4th Cir.)	10
Bingham vs. Powell, 195, S. C. 238, 11-S. E. 2d 275	16
Byrd vs. Atlantic Coast Line Railroad Company (4th Cir.) 2 Fed. 2d 672	15
Cahill vs. N. Y., N. H. & H R. Co., 224 Fed. 2d 637	11
Cahill vs. N. Y., N. H. & Hart. R. Co., 350 U. S. 898, 76 S. Ct. 180	11, 12
Cereste vs. N. Y., N. H, & Hart. Rd. Co., 231 Fed. 2d 50, (2nd Cir.)	9
Chicago and N. W. Ry. Co. vs. Garwood, 167 Fed. 2d 848	12
Curry vs. U. S., 129 Fed. Supp. 38	16
Drawdy vs. Atlantic Coast Line Railroad Company, 75 S. C. 308, 55 S. E. 444	13
Ellis vs. Union Pacific R. Co., 329 U. S. 649, 91 L. Ed. 572	12
Gillespie vs. Ford, 225 S. C. 104, 81 S. E. 2d 44	16
Glenn vs. Southern Ry., 145 S. C. 41, 142 S. E. 801	13
Gunning vs. Cooley, 281 U. S. 90	2
Hale vs. Columbia & G. F. Co., 34 S. C. 292, 13 S. E. 537	13
Jesionowski vs. Boston & Maine R. Co., 329 U. S. 452, 91 L. Ed. 416	12
Larson vs. Chicago & N. W. R. Co., 171 Fed. 2d 841	12
Lavender vs. Kurn, 327 U. S. 645, 90 L. Ed. 916	12, 17
Leppard vs. Southern Ry. Co., 174 S. C. 237, 177 S. E. 129	16
Louisville & N. R. Co. vs. Bolts, 173 Fed. 2d 164	11
Mock vs. Atlantic Coast Line Railroad Company, 227 S. C. 245, 87 S. E. 2nd 830	16
Nofal vs. Atlantic Coast Line Railroad Company, 175 S. C. 94, 178 S. E. 541	13
Risinger vs. Southern Ry., 59 S. C. 429, 38 S. E. 1	13
Shaw vs. Atlantic Coast Line Railroad Company, et al. 238 F. 2nd 525 (Appendix)	1, 18
Smalls vs. Atlantic Coast Line Railroad Company, 348 U. S. 946, 99 L. Ed. 740	10 12

Page

Southern Ry. Co. vs. Toney (4th Cir.), 156 Fed. 2d 261 15
Stone vs. N. Y., Chic. & S. L. Rd., 344 U. S. 407, 97 L. Ed. 441 12
Tennant vs. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 520 ..... 12, 14
Tiller vs. Atlantic Coast Line Railroad Company, 318 U. S. 54, 87 L. Ed. 610 11
Vernon vs. Atlantic Coast Line Railroad Company, 221 S. C. 376, 70 S. E. 2d 862 13
Wilkerson vs. McCarthy, 336 U. S. 53, 93 L. Ed. 497 ..... 10, 12

Statutes

S. C. Code of Laws, 1952, Section 58- 743 ..... 4, 12
S. C. Code of Laws, 1952, Section 58-1004 ..... 4, 13
28 U. S. C. Section 154(1) 2
45 U. S. C. Section 51—Fed. Employers' Liability Act 2, 3, 5
45 U. S. C. Section 53—Fed. Employers' Liability Act 2, 3, 5, 9
45 U. S. C. Section 56—Fed. Employers' Liability Act 5

Miscellaneous

38 Am. Jur. 860 15

Supreme Court Of The United States

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versus

ATLANTIC COAST LINE RAILROAD COMPANY AND
SOUTHERN RAILWAY COMPANY
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fourth Circuit, affirming a judgment of the United States District Court for the Eastern District of South Carolina in favor of respondents, entered upon a verdict directed by the court.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, printed in the Appendix hereto, is reported in 238 Federal Reporter, Second Series at page 525 (Advance Sheet).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

The questions presented arise from the direction of a verdict in favor of the defendants (respondents) under the evidence presented and the applicable law. Because a verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is (*Gunning v. Cooley*, 281 *U. S.* 90), the questions presented are directed to the evidence but they encompass the failure of both the trial court and the Court of Appeals to apply the applicable Federal Law as established by this Court in cases arising under the Federal Employers Liability Act and their failure to apply the South Carolina Law of negligence, contributory negligence and wilfulness in tort actions arising in South Carolina.

The Questions presented are:

I. Was there no negligence or wilfulness on the part of respondent Southern Railway Company as a matter of law?

II. Was there no negligence or wilfulness on the part of respondent Atlantic Coast Line Railroad Company as a matter of law?

III. Were the acts of the deceased the sole cause of his death as a matter of law?

STATUTES INVOLVED

The United States statute involved is the *Federal Employers' Liability Act*, 45 *U. S. C. Sections* 51 *and* 53, Volume 4 page 6480.

45 *U. S. C. Section* 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 *U. S. C. Section* 53. *Contributory negligence; diminution of damages.*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence

in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The South Carolina statutes involved are *Sections* 58-743 *and* 58-1004 *of the* 1952 *Code of Laws of South Carolina*, found in Volume 5, pages 825 and 880 of said Code.

Section 58-743. *Signals to be given at crossings.*

A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car and such bell shall be rung or such whistle sounded by the engineer, fireman or motorman at the distance of at least five hundred yards from the place where the railroad crosses any public highway, street or traveled place and be kept ringing or whistling until the engine or interurban car has crossed such highway, street or traveled place. If such engine or car shall be at a standstill within less distance than one hundred rods of such crossings such bell shall be rung or such whistle sounded for at least thirty seconds before such engine or interurban car shall be moved and shall be kept ringing or sounding until such engine or interurban car shall have crossed such public highway or street or traveled place. A gong of not less than ten inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided.

Section 58-1004. *Injuries at crossings: penalty and damages.*

If a person is injured in his person or property by collision with the engine or any car of a railroad corporation at a crossing and it appears that the corporation neglected to give the signals required by the General Railroad Law and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision or to a fine recoverable by indictment, unless it is shown that in addition to a mere want of ordinary care the person injured or the person having charge of his person or property was at the time of the collision guilty of gross or wilful negligence or was acting in violation of the law and that such gross or wilful negligence or unlawful act contributed to the injury.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Eastern District of South Carolina, Columbia Division, by petitioner, the Executor of the estate of Anthony Alma Rahner, deceased, against the respondents, Southern Railway Company and Atlantic Coast Line Railroad Company, seeking damages for the wrongful death of Mr. Rahner, allegedly caused by the negligence and wilfulness of the respondents. Insofar as the respondent Southern Railway Company is concerned the action is brought under the *Federal Employers Liability Act*, 45 *U. S. C. Sections* 51, 53. Jurisdiction was based upon a diversity of citizenship between the parties plaintiff and defendant, and also, as to the Southern Railway Company, under 45 U. S. C. Section 56.

At the time of his death Mr. Rahner was employed as a conductor on a regularly scheduled first class passenger train of the Southern Railway Company for the run between Columbia, South Carolina and Jacksonville, Florida. At a scheduled stop at Hardeeville, South Carolina he had the duty to cross the main line tracks (North and South) of the Atlantic Coast Line Railroad Company to get to the station and deliver mail and receive his orders for the continued operation of his train. On December 21, 1952 the Southern train arrived in Hardeeville about one hour and fifty minutes late and as Mr. Rahner was crossing the tracks of the Coast Line to get to the station he was killed by a train of the Coast Line going North at a speed of seventy to seventy-three miles per hour. The Coast Line train was about one hour and twenty minutes late at the time.

The station and adjoining property at Hardeeville were owned by the Coast Line but were used by both the Southern and the Coast Line. The Southern had the right to do anything necessary to keep the premises safe.

Mr. Mathias, flagman on the Southern train, testified that there were trees, cattails and shrubbery between the tracks of the Southern and Coast Line at Hardeeville (Appellant's Appendix 7); that as soon as the Southern train stopped, Mr. Rahner "grabbed" the mail and left for the station (Appellant's Appendix 17). Because of the shrub-

bery Mr. Mathias lost sight of Mr. Rahner (Appellant's Appendix 8) and then heard a "report" as the Coast Line train came through the station (Appellant's Appendix 10). The brakes of the Coast Line train were not applied until after the accident (Appellant's Appendix 10) and after the Coast Line train stopped, it took the crew fifteen to twenty minutes to return to the station (Appellant's Appendix 11). In fact, Mr. Moorer, the telegraph operator at the station, said that the brakes of the Coast Line train were applied after sixteen cars went by (Appellant's Appendix 58). The statement of Mr. Collins, Engineer of the Coast Line train, was that his train stopped three-fourths of a mile up the track (Appellant's Appendix 61).

Mr. Shaw testified that it was thirty-one feet between the tracks of the Southern and the Coast Line at a point west of the north end of the station (Appellant's Appendix 24) and the shrubbery was located in this area between the tracks. According to Mr. Mathias, it was only three or four steps between the shrubbery and the first track of the Coast Line (Appellant's Appendix 18); further, he said one could not see down the tract (south) of the Coast Line at the place where Mr. Rahner got off the Southern (Appellant's Appendix 11), and it was necessary to pass through the shrubbery first before you could see (Appellant's Appendix 12). The tracks of the Southern curved as they joined the Coast Line tracks (Appellant's Appendix 25), thus blocking the view.

There was no way for Mr. Rahner to get to the station except to cross the tracks of the Coast Line (Appellant's Appendix 14).

Mr. Moorer, the telegraph operator, knew that both trains were due at about the same time (Appellant's Appendix 49); he knew that people were waiting for a passenger or passengers arriving on the Southern train (Appellant's Appendix 50); he saw these people cross the tracks of the Coast Line to meet the Southern train (Appellant's Appendix 50); he knew that the Conductor of the Southern train had to cross the tracks of the Coast Line; he saw the fireman of the Southern train cross the tracks (Appellant's Ap-

pendix 58); he never saw Mr. Rahner (Appellant's Appendix 52). Notwithstanding his duty to safeguard the area (Appellant's Appendix 50) he gave the "go ahead" signal to the Coast Line train and never changed it. At the time of the accident the weather was hazy (Appellant's Appendix 16).

Mr. Tatem, Superintendent of the Southern, testified that Mr. Rahner made it a practice to try to maintain his schedule (Appellant's Appendix 63). Mr. Mathias testified that the schedule was supposed to be obeyed (Appellant's Appendix 20). The Southern schedule at Hardeeville showed only one time and according to Mr. Mathias the Southern had the same arrival and departure time (Appellant's Appendix 20), so there was no time to wait around in Hardeeville.

Mr. Tatem testified that he knew the Coast Line had high speed trains traveling through Hardeeville (Appellant's Appendix 64); that he knew there were trees and bushes there; that he had never requested the Coast Line or anyone to remove them; that he had never inspected the area even though he did elsewhere (Appellant's Appendix 65, 66). He further testified that there was no device or means whereby the crew of the Southern were warned that Coast Line trains were approaching (Appellant's Appendix 64).

The shrubbery and bushes were cut after the date of the accident (Appellant's Appendix 16); they could have been cut before in order to furnish a safe place in which to work and a better view of oncoming trains.

Mr. Collins, Engineer of the Coast Line train, stated that he saw the Southern train's headlight when he was thirty cars away, that he thought he saw the Southern Train come into Hardeeville (Appellant's Appendix 60), but he didn't know if it had left the station or not and he relied upon the tower man for clear grounds (Appellant's Appendix 60). He never saw Mr. Rahner and the first he knew was when the Fireman said "We are hitting a man." (Appellant's Appendix 59).

The Coast Line Engineer said he blew his whistle so lightly that he could hardly hear it himself (Appellant's Appendix 60). Mr. Moorer, the telegraph operator, standing by

the track, never heard the bell. Mr. Mathias didn't recall whether the Coast Line bell was ringing or not (Appellant's Appendix 14). Mr. Moorer testified that he never heard the Coast Line whistle blow within six hundred fifty feet of the station.

Mr. Moorer, knowing that both trains were late and arriving at about the same time could have given the Coast Line a yellow or red light (Appellant's Appendix 50) to reduce speed or stop, but he didn't. He gave a second "go ahead" signal to the Coast Line when it was only three hundred feet away (Appellant's Appendix 51) even though he knew that Mr. Rahner was due in the station, had not crossed the tracks and further knew that the Southern Fireman had crossed the tracks (Appellant's Appendix 58). This telegraph operator, who was in complete charge of the movements of all trains at Hardeville, testified that he did nothing different than he would have done if there had been no Southern train there (Appellant's Appendix 56, 57).

Mr. Moorer knew that the Southern train crew did not know of the arrival of the Coast Line train. He also testified that the Southern train arrived at the station about thirty seconds before the Coast Line train. He never requested anyone to remove the shrubbery and other obstructions (Appellant's Appendix 56). Mr. Mathias testified that Mr. Rahner got off the Southern train at or near the cattails (Appellant's Appendix 22).

Mr. Laughlin, Fireman on the Coast Line train stated that he saw the Southern train about one-half mile from the station (Appellant's Appendix 41) and he didn't know whether it was discharging passengers or not (Appellant's Appendix 42). He admitted that signals could have been given to reduce the speed of the Coast Line train (Appellant's Appendix 47) but that it was not reduced before the accident.

Rule 30 of the Coast Line (Appellant's Appendix 35) provided that the engine bell must be rung when the engine passes through stations; this was not done.

Rule 107 of the Coast Line (Appellant's Appendix 36) provided that a train must run at a reduced speed in passing between a train discharging passengers and a station except

where properly protected. It was not so protected. At the time the Southern train had just discharged a passenger. The Coast Line train passed between the Southern train (and the passenger) and the station.

Rule 959 of the Coast Line (Appellant's Appendix 37) provided that Engineers must keep a close lookout on the track and take such action as may be necessary to prevent accidents. The Engineer proceeded as if the Southern train were not there.

Rule 1046 of the Coast Line (Appellant's Appendix 38) provided for proper maintenance and safety. If the obstructions had been removed between the tracks, Mr. Rahner would have had a far greater opportunity of detecting the presence of the Coast Line train.

At the conclusion of the defendants' evidence the trial judge directed a verdict in favor of both defendants (respondents), primarily upon the ground that there was no evidence of any negligence or fault on the part of the defendants and upon the further ground that even if they were negligent the death of Mr. Rahner was caused solely by his own acts.

Upon appeal to the United States Court of Appeals for the Fourth Circuit the ruling of the trial judge was sustained in an opinion dated November 7, 1956 (Appendix, infra).

REASONS FOR ALLOWANCE OF THE WRIT

1. *The trial court and the Court of Appeals have disposed of the questions in this case arising under the Federal Employers Liability Act in a way directly opposed to and in conflict with the applicable decisions of this Court.*

"The Supreme Court has construed F. E. L. A. in a manner most generous to employees, presumably on the theory that the statute expresses a policy of unusually high regard for their protection," *Cereste* vs. *N. W., N. H. & Hart. Rd. Co.*, 231 Fed. 2d 50, 54 (2nd. Cir.).

As to respondent Southern Railway Company the question is whether it contributed in any way to the death of Mr. Rahner. (45 U. S. C. Section 53, supra.)

In the case of *Atlantic Coast Line Railroad Company* vs. *Smalls*, 216 Fed. 2d 842 (4th Cir.), tried in Columbia, South Carolina, a verdict was rendered in the District Court for the plaintiff. Upon appeal it was reversed by the Court of Appeals for the Fourth Circuit. In that case certain section hands of the railroad were asked to attend a safety meeting on Saturday, without pay, and at a time when they otherwise would not be working. They were told to wait at a crossing for a train of the Coast Line to stop and pick them up at about 4 o'clock in the morning. While they were waiting, an automobile being driven by one not connected with the railroad ran into three of them and injured them. The Court of Appeals said that there was no evidence of any negligence on the part of the railroad; that the injured parties were approximately 200 yards from the station and they had not been ordered or instructed by the railroad to stand in the highway. That Court also said: "We know of no principle upon which the company could be held guilty of negligence"; that the injuries resulted from their own negligence or that of a third party. Thereafter, this Court reinstated the verdict for the plaintiff without opinion. *Smalls* vs. *Atlantic Coast Line Railroad Company*, 348 U. S. 946, 99 L. Ed. 740.

In *Wilkerson* vs. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497, a railroad switchman crossed an open pit on a narrow board, fell in and was injured. The lower court directed a verdict for the defendant railroad. The evidence showed that others used the board, but the railroad had put up chains enclosing the pit. There was testimony that the board was greasy. The evidence showed that the injured party could have taken a slightly longer route and walked around the pit. This Court said that this contributory negligence was no bar, that the issues should have been submitted to the jury. Even though there was no testimony that after the chains were put up anyone used this board but pit men (the plaintiff was not a pitman), this Court said: "While this left only a very narrow conflict in the evidence, it was for the jury, not the Court, to resolve the conflict," and, further, this Court said: "The standard of care should be commensurate with the business." This Court said also: "It was because of the import-

ance of preserving for litigants in F. E. L. A. cases their rights to a jury trial that we granted certiorari in this case." Also, "This Court has previously held in many cases that where jury trials are required, Courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues."

In *Louisville & N. R. Co.* vs. *Bolts*, 173 Fd. 2d 164, a switchman tried to get on a moving engine and he slipped and his leg was cut off. A verdict was rendered for the plaintiff and upon appeal the Court said "The opinions of the Supreme Court have declared that it is 'the clear congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury', *Tiller* vs. *Atlantic Coast Line Railroad Company*, 318 U. S. 54, 87 L. Ed. 610; that such cases may not be taken from the jury, merely because the question of liability is close or doubtful." And there the court said further that it is not the duty of the court to search the record for conflicting statements.

In *Cahill* vs. *N. Y., N. H. & H. R. Co.*, 224 Fed. 2d 637, the injured brakeman was struck by a truck of a third party in no way connected with the railroad. When said truck had stopped only three or four feet from the plaintiff, the truck started without warning at a time when the plaintiff was walking around the car to see if other trucks could clear the car. The Circuit Court stated that the sole cause of the injury was the negligence of the truck driver and it could not be anticipated that the truck, only three or four feet away, would start without warning. Accordingly, the Circuit Court said that the railroad was not liable but that holding was later reversed by this Court in *Cahill* vs. *N. Y., N. H. & H. R. Co.*, 350 U. S. 898, 76 S. Ct. 180.

It is perfectly clear that the Southern failed to furnish Mr. Rahner a safe place in which to work. He had to cross tracks with no notice of trains arriving; his view was obstructed until he was almost on the track; his train was late and he was charged with the duty of maintaining the schedule; he had to go across the tracks to get a clearance; and the Southern officials had never inspected the area to de-

termine whether it was a safe place or a proper place for their employees to work. Furthermore, the telegraph operator had duties to perform for both railroads which he performed improperly.

The respondent Southern Railway Company through its crew or through the personnel in the station who performed duties for it should have warned Mr. Rahner of the oncoming train. *Chicago and N. W. Ry. Co.* vs. *Garwood*, 167 Fed. 2d. 848. Unless there is a complete absence of probative facts, the question of whether defendant was guilty of negligence in furnishing a reasonably safe place to work was for the Jury to determine from all the facts and circumstances, *Larson* vs. *Chicago & N. W. R. Co.*, 171 Fed. 2d 841.

The following cases of this Court emphatically held that the litigants were entitled to a jury determination of the issues: *Wilkerson* vs. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497; *Tennant* vs. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520; *Smalls* vs. *Atlantic Coast Line Railroad Company*, 348 U. S. 946, 99 L. Ed. 740; *Cahill* vs. *N. Y., N. H. & A. R. Co.*, 350 U. S. 898, 76 S. Ct. 180; *Lavender* vs. *Kurn*, 327 U. S. 645, 90 L. Ed. 916; *Jesionowski* vs. *Boston & Maine R. Co.*, 329 U. S. 452, 91 L. Ed. 416; *Ellis* vs. *Union Pacific R. Co.*, 329 U. S. 649, 91 L. Ed. 572; *Stone* vs. *N. Y. C. & S. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441.

2. *The Trial Court and the Court of Appeals decided the questions of negligence and wilfulness in a way directly opposed to and in conflict with the applicable law of South Carolina.*

The testimony of the telegraph operator, who was in complete charge of the movements of all trains at Hardeeville, that he did nothing different than he would have done if there had been no Southern train there (Appellant's Appendix 56, 57) is an absolute indictment of the fault of the Coast Line (and the Southern, too) and the key to the fatal accident.

Section 58-743 *of the* 1952 *Code of Laws of South Carolina* provides in part that a bell on each locomotive shall be rung "at least five hundred yards from the place where the railroad crosses any public highway, street or traveled place

and be kept ringing or whistling until the engine or interurban car has crossed such highway, street or traveled place." *Section* 58-1004 *of the* 1952 *Code of laws of South Carolina* provides that if a person is injured by an engine which failed to give such a signal, then the mere want of ordinary care of the person injured is insufficient to bar recovery, but it must be shown that such person at the time was guilty of gross or wilful negligence which contributed to the injury. The statute is constitutional. *Atlantic Coast Line R. Co.* vs. *Ford*, 287 U. S. 502, 77 L. Ed. 457.

A traveled place is a place where persons are both accustomed to and have a right to travel. *Hale* vs. *Columbia & G. R. Co.*, 34 S. C. 292, 13 S. E. 537. An open space going from the streets to a depot (but not a street) has been held to be a "traveled place." *Risinger* vs. *Southern Ry.*, 59 S. C. 429, 38 S. E. 1.

"Failure to give the signals, if found, gave rise to a rebuttal presumption of its proximate cause of the collision, and was evidence of wilfulness and wantonness which would justify an award of punitive damages," *Vernon* vs. *Atlantic Coast Line Railroad Company*, 221 S. C. 376, 70 S. E. 2d 862.

The signal must be given continuously in order to give notice of "location of the train and the rapidity of its approach." *Drawdy* vs. *Atlantic Coast Line Railroad Company*, 75 S. C. 308, 55 S. E. 444.

"If the statute is not observed to the letter by giving the signal for the full prescribed period of time, then the railcompany is negligent per se, and a presumption of fact arises that the failure to give the required signals was a proximate cause of the injury." *Glenn* vs. *Southern Ry.*, 145 S. C. 41, 142 S. E. 801. Recovery was affirmed in the case where the plaintiff was injured while crawling between stationary cars.

The failure of the railroad to ring the bell or sound the whistle was sufficient to authorize recovery even though the motorist by the exercise of ordinary care could have avoided the accident. *Nofal* vs. *Atlantic Coast Line Railroad Company*, 175 S. C. 94, 178 S. E. 541.

It is hard to imagine anything more hazardous than the Coast Line train on a hazy night, behind schedule, without

reducing speed and traveling in excess of seventy miles per hour, unable to stop in less than three-fourths of a mile, coming through a station when other people had to cross its tracks to get to and from the station and a waiting train which was known to be there. Actually, at that speed through the station the Coast Line could not have reacted to or have protected or safeguarded anyone on or near the tracks.

The violation of the rules of the respondent Coast Line by its employees was negligence. "In view of respondent's own rule that a bell must be rung 'when an engine is about to move,' it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence," *Tennant* vs. *Peoria and P. U. Ry. Co.,* 321 U. S. 29, 88 L. Ed. 520.

3. *The Trial Court and the Court of Appeals decided the question of contributory negligence in a way directly opposed to and in conflict with the applicable law of South Carolina.*

Insofar as the Southern is concerned, contributory negligence or wilfulness does not bar recovery. Further, if the Coast Line failed to give the statutory signals then contributory negligence of the deceased is no bar to recovery; and contributory negligence is no defense to wilfulness or gross negligence.

Mr. Rahner could not see the train of the Coast Line. It was travelling at 110 feet per second. His view was blocked until he was practically on the track. He was in a lighted area which made more difficult the determination of oncoming lights. The Southern train and track blocked his view as he left his train, then the bushes and trees. There was no testimony that Mr. Rahner ever saw the Coast Line train. Mr. Messer, baggagemaster of the Southern, saw Mr. Rahner running, but he never saw him look towards the Coast Line train (Appellant's Appendix 62, 63) even though Mr. Messer stated that he never took his eyes off Mr. Rahner. Mr. Rahner may well have been hurrying to help make up time, since his train was so late. Mr. Messer was up in the baggage car, several feet higher than Mr. Rahner, yet he never saw the Coast Line train until just before it hit Mr. Rahner (Appellant's Appendix 62).

If the telegraph operator never heard the bell of the Coast Line, the jury could conclude that Mr. Rahner didn't either. As for the whistle, the Engineer of the Coast Line said he could hardly hear it (Appellant's Appendix 60), so the jury could certainly conclude that Mr. Rahner didn't hear it.

Mr. Rahner had the positive duty of crossing the Coast Line tracks and getting a clearance card, and not allowing his train to be detained (Appellant's Appendix 35). He did not have to wait for other trains (Appellant's Appendix 9). He had no notice of the arrival of the Coast Line train. It was not due at that time.

The Southern Fireman crossed the tracks; he must have thought it safe. Incidentally that fireman did not testify and his absence was unexplained. His testimony would have apparently been unfavorable to the appellees.

Mr. Rahner had a right to rely upon the rules of the Coast Line and that they would be obeyed. He was required to take an examination on the rules of the Coast Line and keep a copy of the rules with him (Appellant's Appendix 14).

The fact that one who took a risk took it in the performance of duty is entitled to great weight in determining whether his conduct was negligent, 38 *Am. Jur.* 860 *Negligence, Sec.* 182.

In *Byrd* vs. *Atlantic Coast Line Railroad Company* (4th Cir.), 2 Fed. 2d 672 the plaintiff's testator stopped his automobile to allow a train to pass and then proceeded to cross the remaining track and was struck by another train. The Court said: "He took no precaution whatever before attempting to drive across the second track," but since there was a conflict in the evidence as to whether the crossing signals were given, the Court said the issue should have been submitted to the jury and reversed the District Judge.

In *Southern Ry. Co.* vs. *Toney* (4th Cir.), 156 Fed. 2d 261, the Court affirmed a verdict for the plaintiff who drove his car at thirty miles per hour into a stationary train which was blocking the highway. The testimony was that it was somewhat foggy. The plaintiff was familiar with the cross-

ing, his testimony was not clear and he testified that he couldn't even say if he listened for a train. "The determination of question of contributory negligence is controlled by circumstances of particular case, and Court will not decide it as one of law if testimony is conflicting or if conclusion to be drawn therefrom is doubtful," citing headnote in *Bingham* vs. *Powell*, 195 S. C. 238, 11 S. E. 2d 275.

In *Leppard* vs. *Southern Ry. Co.*, 174 S. C. 237, 177 S. E. 129, the plaintiff's testate was lying on the tracks in a drunken stupor, yet the court held that the question of contributory negligence was for the jury.

Mr. Rahner (age 69) wore special arch supports because of a foot injury sustained in the war (Appellant's Appendix 28); he had had a hernia operation in the summer of 1952 and had not returned to work long before his death; he wore glasses; he did not drive an automobile at night and lights bothered him at night. His physical condition was known to his employer, the Southern Railway Company, because of regular physical examinations.

Contributory negligence does not bar recovery. Failure to give the statutory crossing signals is evidence of negligence, wilfulness and recklesness, *Curry* vs. *U. S.*, 129 Fed. Supp. 38. "If the crossing signals were not given as required by Section 8355 of the Code (and this was a question for the jury to determine), it became incumbent upon the railroad to show that the respondent's testator was guilty of gross or wilful negligence in order to bar recovery." *Allen* vs. *Southern Ry.*, 218 S. C. 63, 61 S. E. 2d 660. (Section 8355 is now Section 58-743).

"Ordinarily, it is the function of the jury to pass upon the issues of negligence, wilfulness, and wantonness * * *; contributory negligence is an affirmative defense and the defendant who pleads it has the burden of establishing it by the preponderance of the evidence. It rarely becomes a question of law for the Court," *Gillespie* vs. *Ford*, 225 S. C. 104, 81 S. E. 2d 44, cited with aproval in *Mock* vs. *Atlantic Coast Line Railroad Company*, 227 S. C. 245, 87 S. E. 2d 830.

CONCLUSION

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is *a complete absence of probative facts* to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added), *Lavender* vs. *Kurn*, 327 U. S. 645, 90 L. Ed. 916.

The foregoing review of the evidence clearly shows that there were "probative facts" to be submitted to the jury.

For the foregoing reasons this petition for writ of certiorari should be granted.

All of which is respectfully submitted.

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN ROBERT SHAW, as Executor of the Estate of ANTHONY ALMA RAHNER, Deceased
APPELLANT,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY
APPELLEES.

No. 7226

United States Court of Appeals
Fourth Circuit

Argued October 8, 1956
Decided November 7, 1956

SOPER, CIRCUIT JUDGE:

This suit against the Atlantic Coast Line Railroad Company and the Southern Railway Company was brought by the Executor of the estate of a conductor employed by the Southern, who was killed by a train of the A.C.L. in attempting to cross its tracks at 4:30 A.M. on December 21, 1952, at Hardeeville, South Carolina. This suit against A.C.L. claimed damages for wrongful death and was brought under the Lord Campbell's Act of South Carolina, Sections 10-1951 and 10-1952 of the South Carolina Code of 1952. The suit against Southern on the same cause of action was brought under the Federal Employers' Liability Act, 45 U.S.C. 51, since the deceased was engaged in the performance of his duties as its employee when he was killed. At the conclusion of the plaintiff's evidence at the trial in the District Court both defendants moved for directed verdicts in their behalf but the District Judge overruled the motions in order to afford

the plaintiff the opportunity to cross-examine the defendants' witnesses. Similar motions were made at the end of the defendants' evidence and were then granted, the Judge being of the opinion that the sole cause of the accident was the action of the deceased in trying to cross the railroad tracks when he knew that a rapidly moving train was approaching.

The scene of the accident was a small wayside station of A.C.L. at Hardeeville, which was maintained by A.C.L. but was used by both railroads since the Southern makes use of the tracks of A.C.L. from this point south to Jacksonville, Florida. The station building had a frontage of 90 feet and a depth of 25 feet. Two tracks of A.C.L. ran north and south close to its west side. The easternmost rail of the northbound track was located 16½ feet from the station and the west rail of the southbound track 35 feet therefrom. A single track of the Southern was located 31 feet west of the westernmost rail of A.C.L., and the distance from Southern's track to the northbound track of A.C.L., on which the man was killed, was 44 feet 4 inches. The intervening space between the tracks of the two railroads was a park-like area with some growing trees and shrubbery. This area was maintained by A.C.L. but the Southern had the right to put the property and its appurtenances in good condition if A.C.L. failed to perform this duty but had never requested A.C.L. to remove the trees and shrubbery between the tracks. The station was in the charge of a lever telegraph operator of A.C.L. who regulated the movement of the trains at this point for both railroads.

The accident occurred when an A.C.L. express train going north on the track nearest the station at something more than 70 miles per hour passed a motionless Southern train, which was headed south and had come to a stop at the station on its own track a few moments before. The station master had had 2 minutes previous notice of the arrival of the Southern train and about 8 minutes notice of the arrival of the A.C.L. train, which was not scheduled to stop at the station, and had given it the green light to go through without reducing speed. In the meantime the station master, in accordance with a rule of his railroad, which required the movement of the train to be protected under such conditions, had super-

vised the crossing of the A.C.L. tracks by three persons who had come to meet a deaf and dumb child, the only person to arrive on the Southern train. These persons had crossed and were standing alongside the Southern train when the A.C.L. train came through.

The Southern train was in charge of Anthony A. Rahner, the conductor who was killed. He was 69 years of age and had been employed by the Southern for more than 40 years. Upon the arrival of his train he and his flagman alighted on the ground. Rahner innstructed the flagman to warn the porter of the train not to let the defective child be run over. At that moment the A.C.L. express was not more than 30 seconds away; and the flagman, standing on the ground, heard its warning signal and the great noise of its three diesel engines and 15 cars, and saw the reflection of its double headlights as it rushed towards the station.

It was the duty of the deceased conductor to cross from his train over the main line of the A.C.L. to the station to deliver mail and receive a clearance order permitting his train to proceed. After speaking to the flagman he walked a short distance ahead to the baggage car of his train, took some mail from the man in charge and started towards the station, and while he was still in the park-like area he broke into a run in an evident attempt to cross the tracks of the A.C.L. train but was hit and killed before he could cross the northbound track on which the express was running. The flagman saw him run across the park-like area but because of the shrubbery lost sight of him before he reached the A.C.L. tracks and was struck. This account of the accident was given by the flagman, a witness for the plaintiff. It was supported by the testimony of the baggage man on the Southern train, a witness for the defendant, who was standing in the door of the baggage car and handed the mail to his conductor and then watched him run across the intervening space of the A.C.L. tracks until he was hit by the train. This witness testified that he also was aware that the express train was approaching. The engineer on the A.C.L. express was on the right side of the leading diesel and did not see the conductor, but the brakeman on the left side caught sight of the man an instant before he was struck.

Upon this state of the record the appellant contends that the Southern was guilty of negligence because it failed to furnish Rahner a safe place to work, in that it permitted the trees and shrubbery to remain in the intervening space knowing that Rahner was obliged to cross the A.C.L. tracks in the performance of his duties without special notice of the approach of trains. It is pointed out that the Southern train was behind its schedule and that it was the duty of the conductor to go to the station as quickly as possible for his clearance in order to expedite the movement, and it is said that it is reasonable to infer that in this instance his view was obscured by the shrubbery so that he was unaware of the danger until it was too late.

The undisputed evidence in the case is to the contrary. Rahner was a trainman of many years experience, familiar with the conditions existing at the station. He had been on the same run for more than three years and had taken his train through on many previous occasions. He knew that high speed A.C.L. trains passed through the station and that southbound Southern trains stopped at the station to permit A.C.L. trains to pass. He showed his awareness of the oncoming train that morning by warning his flagman to lookout for the child. Even more significant is the evidence that, in common with other railroad men present, he actually knew that the train was rushing toward the station from the thunderous noise of the engines and cars and the flashing of the headlights. Furthermore, the growth between the tracks could not have contributed to the catastrophe, as is shown by the uncontradicted evidence of witnesses on both sides. The photographs submitted by the plaintiff show that the trees and shrubbery did not grow immediately alongside the A.C.L. tracks and there was ample space, not less than 25 feet between the trees and the tracks within which a train approaching the station from the south could be seen for more than a mile.

The appellant also rests its case upon the statutory rule, 45 U.S.C. 53, that, under the Federal Employers' Liability Act, contributory negligence of a plaintiff employee does not bar recovery for injuries but merely goes to the diminution of the damages. It is said that even if the deceased was

negligent in running upon the A.C.L. tracks as described, there was negligence on the part of both railroads in allowing the train to pass through the station at high speed while a Southern train was standing at the station to receive and discharge passengers, although the station operator had previous knowledge that both trains were about to arrive.

That there was an element of danger in such a situation is obvious but it does not follow that the operation was negligent. It is common knowledge that through trains customarily pass small wayside stations without stopping or slowing down; and the custom was recognized in a rule of the A.C.L. which provided that trains and engines must run at reduced speed in passing a train receiving or discharging passengers at a station, and that trains must not pass between such a train and the platform at which passengers are being received or discharged, except where proper safeguards are provided or the movement is properly protected. The evidence shows that under this rule it became the duty of the station operator to watch over and supervise the movement of passengers across the A.C.L. tracks upon the approach of a through train and that the operator performed this duty on this occasion. No evidence was offered to show that this practice was considered by experienced railroad men, or by anyone, to be negligent or improper. No one at the station that morning was actually exposed to danger except the most experienced railroad man present, and he only because of his own conduct. As the District Judge held, the passing of the train created a condition of which the deceased was well aware but refused to recognize, and hence it must be held that his death was not due to the great speed of the train but to his own voluntary act. See *Hartley* v. *A.C.L.R. Co.*, 5 Cir., 194 F. 2d 590; *Chesapeake & Ohio R. Co.*, v. *Burton*, 4 Cir., 217 F. 2d 471; *Moore* v. *Southern Ry. Co.*, 163 S. C. 342, reversed 284 U. S. 581; *Wolfe* v. *Henwood*, 8 Cir., 162 F. 2d 998; *Murray* v. *A.C.L.R. Co.*, 4 Cir., 233 F. 2d 214; *Atlantic Coast Line R. Co.* v. *Glenn*, 4 Cir., 198 F. 2d. 232; *N. Y. C. & St. L. R. Co.* v. *Boulden*, 7 Cir., 63 F. 2d 917; *Drawdy* v. *Atlantic Coast Line R. Co.*, 75 S. C. 308.

The same considerations apply in the case against A.C.L. and, in addition, it has the defense of contributory negligence

on the part of the deceased, which is conclusively established. It is contended that negligence on the part of the A.C.L. was shown because the evidence as to whether the bell of the engine was rung as the train neared the station is somewhat uncertain; but this is immaterial, for it is certain that the ringing of the bell would have added nothing to the warning which the deceased was given by the noise and lights of the approaching train.

Affirmed.